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Is Your Contract with a First Nation Binding? Maybe Not.

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Industry and First Nation governments frequently contract with each other on the basis that the signature of the Chief, or Chief and Council, is the only requirement to create a binding legal obligation of the First Nation government. In some instances, a band council resolution is requested as additional evidence of authorization, and in others community ratification vote. Is this enough to ensure that a contract between industry and a First Nation government is legally binding? Maybe not.

Section 2(3)(b) of the *Indian Act* RSC, 1985, c.I-5 (the "***Indian Act***") states that **a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened**.

Based on section 2(3)(b) of the *Indian Act* and its interpretation by the courts, a party cannot simply rely on the "standard evidence" of contractual authorization when determining whether a contract with a First Nation government is a legal, valid and binding obligation of that First Nation government.

Courts have held that an agreement signed by a First Nation's Chief, or a majority of its Councillors, on its own will not be sufficient to create a legal, valid and binding obligation of the First Nation government if it is determined that a band council meeting did not actually take place or was not "duly convened" in accordance with section 2(3)(b) of the *Indian Act*.[1]

While the Ontario and Federal corporate statutes provide that a resolution in writing executed by all of the directors of a corporation entitled to vote at a meeting of directors is as valid as if it had been passed at a meeting of directors, there is no corresponding provision for band council resolutions under the *Indian Act*.[2]

Under Ontario and Federal corporate statutes, the "indoor management rule" provides some protection to parties relying on the customary power of a person "held out" by a corporation as having the necessary authority to bind the corporation.[3] While there is no corresponding "indoor management rule" under the *Indian Act*, some courts have found that the *Indian Act* does not exempt First Nation governments from the common law principle of ostensible authority. Although the case law is not definitive, courts have

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1. *W. Downer Holdings Ltd. v Red Pheasant First Nation,* 2012 SKQB 468.
2. *Business Corporations Act*, RSO 1990, c B.16, s 129(1); *Canada Business Corporations Act,* RSC 1985, c C-44, s 117(1).
3. *Business Corporations Act*, RSO 1990, c B.16, s 19(d); *Canada Business Corporations Act,* RSC 1985, c C-44, s 18(1)(d).

found that a contract that was not authorized pursuant to section 2(3)(b) of the *Indian Act* is binding on the First Nation where the common law test for ostensible authority has been met.[4]

Both industry and First Nation governments have significant interests in ensuring that the agreements they make with each other are legal, valid and binding obligations on both parties, to that end they need to ensure that: **(a)** the execution of the agreement was authorized by the majority of the councillors of the band; and **(b)** such authorization occurred at a meeting of the council that was duly convened in accordance with the First Nations by-laws and procedures (if any).

This is only one of the unique considerations for industry and First Nations when contracting with each other. Failure to consider and address these issues can create significant uncertainty for both sides and endanger their contractual relationship.

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[4] *Maloney v Eskasoni Indian Band*, 2009 NSSC 177, 2009; *Sands v Walpole Island First Nations Band Council*, 2016 ONSC 7983.